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October 13, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 94-54

Dear Mr. Caton:

Transmitted herewith for filing with the Commission, on behalf of The Bell Atlantic Companies, are an original and five copies of their "Reply Comments" on the Commission's Notice of Proposed Rulemaking and Notice of Inquiry in the above-referenced proceeding.

Should there be any questions with regard to this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service	)	CC Docket No. 94-54

REPLY COMMENTS OF THE BELL ATLANTIC COMPANIES

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Dated: October 13, 1994

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REPLY COMMENTS OF THE BELL ATLANTIC COMPANIES

I. SUMMARY

The comments filed in this proceeding reveal a consensus in favor of two cardinal principles: Avoid unnecessary regulation, but, where regulation is warranted, impose it consistently. These are the fundamental principles on which Congress based its 1993 revision of Section 332 of the Communications Act. They are also the correct principles as a matter of regulatory policy because they permit fair competition to take the place of regulation.

Bell Atlantic strongly believes, however, that these two principles must be interdependent. Competition can only achieve its benefits where competitors have consistent obligations. Where they do not, the Commission should intervene to restore competitive equality. If there is a regulatory disparity which impairs evenhanded competition, Commission intervention is not only justified but is required by Section 332.

These principles provide the answers to each of the three regulatory issues presented by the Notice of Proposed Rulemaking:

1. Equal access. All cellular, PCS and SMR carriers offering CMRS should be required to offer interexchange carriers equal access to subscribers as long as equal access remains imposed on BOC-affiliated cellular carriers. While the comments make conflicting claims as to the costs and benefits of equal access, no one defends the current irrational regime in which some carriers must offer equal access but their competitors need not. The record shows, in fact, that the current regime is impeding competition and disserving the public. Rather than allow that regime to remain, the Commission should adopt consistent equal access rules for the CMRS industry.

2. LEC interconnection. The Commission should continue to enforce its current policies on LEC-CMRS interconnection. The record provides no basis to conclude that tariffed interconnection would provide any benefits, and in fact demonstrates that such regulation would impose unnecessary costs and burdens.

3. CMRS interconnection and resale. There is also no need for the Commission to consider new rules to regulate interconnection among CMRS carriers. The market has functioned adequately to provide interconnection arrangements where carriers desire it. There is no reason to believe that it will fail to work in the future. Moreover, given the current pace of evolution of the wireless industry, specific rules now would be premature. The Commission should, however, require unrestricted resale of all CMRS services.

II. CONSISTENT CMRS EQUAL ACCESS RULES SHOULD BE ADOPTED.

The comments responding to the Notice's inquiry as to whether equal access should be expanded to other CMRS carriers were not surprising. Interexchange carriers, states and CMRS carriers which must currently offer equal access support its expansion.[1/] Carriers which are not now required to offer equal access oppose it.[2/] The record contains conflicting claims as to the costs and benefits of equal access.

There is, however, consensus on one critical point: The current regime of unequal equal access which results from the MFJ Court's prior actions is not serving the public. No one sought to defend the current regime as pro-competitive, pro-consumer, or as advancing the Commission's goals for expansion of CMRS to serve the public. To the contrary, time and again the point is made that inconsistent regulation is harmful and is simply bad public policy.[3/] Nowhere is there a greater inconsistency than in the night-and-day disparity in equal access obligations, in which some

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1/ E.g., Comments of AT&T at 3; Comments of MCI at 2; Comments of Allnet Communication Services, Inc. at 2; Comments of Ameritech at 1; Comments of BellSouth at 32; Comments of NARUC at 2; Comments of State of New York at 2; Comments of State of California at 2.

2/ E.g., Comments of Century Cellunet, Inc. at 4; Comments of Vanguard Cellular Systems at 2; Comments of Horizon Cellular Telephone Co. at 1; Comments of SNET Mobility at 5; Comments of GTE Service Corp. at 2; Comments of National Telephone Cooperative Ass'n at 2.

3/ E.g., Comments of Personal Communications Industry Ass'n at 9; Comments of AT&T at 6; Comments of MCI at 3; Comments of McCaw Cellular Communications at 27; Comments of AirTouch Communications at 8; Comments of Ameritech at 1-2.

carriers must comply while others are totally exempt. This disparity can and should be promptly corrected.

A. The Choice the FCC Must Make Is Between Partial Equal Access and Full Equal Access.

Many commenters who oppose equal access misstate the issue. They assert that equal access would have burdens and costs that outweigh any benefits, as if the Commission is considering whether or not to impose it at all. The Commission is, however, not writing on a clean slate. Equal access has for years been a fact of life for a significant portion of the cellular industry, and remains so. The issue here is whether the current incongruous regime, in which equal access is a rule for only part of the industry, is in the public interest. If it is not, the Commission needs to eliminate the incongruity. Put another way, the choice it must make is whether (1) to leave in place the status quo of partial equal access, or (2) to make equal access a universal obligation of CMRS carriers.

Bell Atlantic believes that, because of the numerous, documented harms to competition and to consumers which the current regime of partial equal access is causing, the Commission cannot lawfully allow the status quo to remain unchanged. While Bell Atlantic would prefer elimination of all equal access obligations, that is not the issue before the Commission. Given that equal access is well established throughout a large segment of the CMRS industry, extending it to the remainder of the industry far better serves the public interest than leaving the current regime in place.

B. The Record Shows That Partial Equal Access Is Contrary to the Public Interest.

The Notice stated that one of the reasons why equal access should be adopted for the CMRS industry was the need to achieve regulatory symmetry, noting Congress's mandate in Section 332. The record bears the Notice out. It shows that nowhere is achieving regulatory consistency more important than as to equal access because of the significant distortions that inconsistent regulation has on the CMRS marketplace. The record is replete with evidence as to why the current regime distorts and impairs competition, creates inefficiencies, misdirects investment, and raises prices to consumers.[4/] The record not only provides the Commission with a sound basis on which to impose equal access uniformly; it also demonstrates why failing to do so would disserve the public interest.

The importance of symmetry recurs throughout the record on each issue raised by the Notice. Symmetry is both the foundation of new Section 332 and the key to the Commission's extensive efforts to rewrite its regulation of mobile services. Where regulation is inequitable, and carriers are not competing under

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4/ Comments of Bell Atlantic at 5-7; Comments of BellSouth at 3; Comments of AirTouch at 8; Comments of AT&T at 6; Comments of McCaw at 27 (consistent rules essential to prevent "regulatory gaming" that distorts the market); Comments of Ameritech at 2; Comments of NYNEX at 5-6 (current situation undermines competitive pressures on non-BOC cellular carriers, leading to higher prices for customers); Comments of State of New York at 2-4. The Notice (at ¶ 2) stated, "Implementing an even-handed regulatory scheme under Section 332 would promote competition." The record amply supports that conclusion, and provides no evidence to the contrary.

the same set of rules, the presumption that competition will promote consumer choice, reduce prices and generate other benefits disappears. This is why it is critical that, as long as some CMRS carriers must offer equal access, the Commission needs to adopt a consistent, evenhanded equal access policy.[5/]

Those opposing equal access do not grapple with the harms to the public interest created by the status quo.[6/] In failing to address those harms, they do not rebut the position of Bell Atlantic and other commenters that extending equal access is a sounder regulatory policy than permitting the current inequality to persist.

Other commenters acknowledge the principle of parity but belittle it.[7/] They ignore the fact that parity is not merely a desirable public policy goal, but one which Congress has stated should be the basis for the Commission's regulation of CMRS. The Commission cannot take actions which create or perpetuate

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5/ Should the Commission determine that equal access in principle is not in the public interest, it should intervene in the pending proceedings in the MFJ court to oppose equal access for any and all CMRS providers. Such intervention would be not only proper but essential if the Commission is to assert its position as the agency with primary responsibility for federal telecommunications policy.

6/ Many do not mention the benefits of symmetry at all nor explain why eliminating the current disjointed regime would not be in the public interest. E.g., Comments of National Telephone Cooperative Ass'n; Comments of AirTouch; Comments of GTE Service Corp.

7/ Comments of TDS at 16, Comments of Vanguard at 17. Vanguard charges that the concept of parity is "often misused" but does not say why or otherwise defend that assertion. It then falls back on a non sequitur, asserting that "regulatory parity is not a good valued by consumers." Aside from being unsupported, this is, of course, not the issue, and not what Section 332 says.

regulatory inequities without violating the mandate of Section 332. It is, however, important that the Commission achieve a consistent, equal access regime not merely because Section 332 requires it, but because consistent regulation is a positive good in and of itself. Given existing equal access regulation of the industry, extension of equal access to remaining CMRS carriers will best serve the public interest.

A few commenters attempt to justify the extension of equal access to cellular carriers, but not to other CMRS providers, on the ground that only cellular carriers have market power.[8/] This claim is both factually incorrect and legally irrelevant. The record, to the contrary, shows that the cellular industry is characterized by vigorous and growing competition. By far most commenters stress that if equal access is adopted it should apply to CMRS generally.[9/] Even were the Commission to determine -- which it has not -- that cellular carriers possess market power, that would not justify leaving the existing equal access regime in place, because that regime does not even reach all cellular carriers.[10/] In addition, a proper evaluation of equal access

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8/ E.g., Comments of Nextel at 8.

9/ Comments of PCIA at 8; Comments of GTE Service Corp. at 22-29 and attached study of Charles River Associates; Comments of Southwestern Bell Corp. at 45-48; Comments of State of New York at 2; Comments of State of California at 2; Comments of McCaw at 27.

10/ Nothing more plainly reveals the illogic of the current regime than its unequal application to directly competing cellular carriers offering exactly the same CMRS service. Parity does not tolerate such an arbitrary distinction.

To the extent that the current regime was based on concerns about cellular affiliation with the local wireline telephone

does not turn on whether or not the wireless carrier has market power. See Notice at ¶¶ 136-39; Bell Atlantic Comments at 8-9. Extending equal access only to cellular carriers, but not to other CMRS carriers which the Commission authorized to compete head-on with cellular, would be arbitrary and unwarranted, and would allow those competitors to compete unfairly for customers, keeping in place the very regulatory inequity that must be addressed.[11/]

The fact that the current disparity in the obligations of CMRS providers is not of the Commission's own making does not justify the Commission's inaction. The Commission must instead confront the harms of the current unequal regime and alleviate them by adopting a consistent equal access policy coextensive with MFJ-imposed equal access.

C. The Costs of Converting Remaining CMRS Providers to Equal Access Do Not Justify Leaving the Current Harmful Regime in Place.

Those CMRS providers not currently offering equal access object that a Commission requirement for across-the-board equal access would be a drastic step which would impose significant

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carrier, that ground also does not allow the Commission to permit the regime to remain unchanged. BOC cellular carriers are subject to equal access even where they do not provide overlapping wireline service, while other carriers are exempt -- even though they are the local wireline carrier. GTE/Contel's cellular systems, for example, do not offer equal access although they are affiliated with both a wireline telephone company and an IXC. The market distortions that have resulted necessitate Commission intervention.

11/ Bell Atlantic agrees with other commenters (e.g., Comments of McCaw at 27) that the extension of equal access to all CMRS providers, including those offering formerly private services, is not precluded by Section 332(c)(2)(B). There is no justification for delaying consistent equal access.

costs on them. In fact, however, equal access is already in place for a significant, and growing, portion of the CMRS industry.[12/] Requiring the balance of cellular systems to follow the same rules that a substantial part of the industry already follows would not be the "extreme regulatory intervention" that some carriers assert.[13/] Moreover, PCS and SMR carriers are only now beginning to construct their systems and can include equal access as part of their startup costs; no conversion costs are involved.[14/]

In addition, opponents of extended equal access obligations premise their arguments on the assumption that they will have to bear the full costs of compliance. However, the Notice (at ¶ 95) proposed that the IXCs be required to bear the costs of equal access conversion. To the extent that the Commission is concerned as to the costs of equal access on certain CMRS carriers, it can adopt rules for recovery of conversion costs from IXCs seeking

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12/ In most markets at least one system is operated by a BOC affiliate required to offer equal access. In some markets such as Washington, D.C., both carriers are BOC affiliates. AirTouch Communications, although not subject to MFJ-imposed equal access since its separation from Pacific Bell, has decided to retain equal access in all of its many markets "because of customer demand". Comments of AirTouch at 5. In addition, AT&T will convert all of the properties operated by the largest cellular carrier, McCaw, to equal access. U.S. v. AT&T Corporation and McCaw Cellular Communications, CA No. 94-01155 (Complaint, Stipulation and Final Judgment, filed July 15, 1994).

13/ Comments of Vanguard at 6.

14/ Given that at least one large SMR carrier is rapidly expanding its systems and that PCS licenses will be auctioned in a few months, it is critical that the Commission act promptly on equal access so that these carriers can include the necessary equipment in construction. This need for prompt action would justify the Commission in issuing an Order on equal access issues alone, deferring action on the remaining interconnection issues to a later date.

access. This would alleviate most of the burden of adopting equal access.[15/] The parties who rely on claims of burdensome cost ignore this solution.

In short, the costs of converting the remainder of the CMRS industry to equal access are not so significant as to warrant perpetuating the current regulatory inequity.

Bell Atlantic agrees with other commenters that equal access should not, however, be applied to one-way paging, acknowledgment paging, other data transmission services such as Cellular Digital Packet Data Service (CDPD) and IS-41 signalling technology.[16/] Given the many differences in the way that these services operate compared to voice-based transmission services, the imposition of equal access would be technically impractical as well as unnecessary. The MFJ Court has already granted a generic exemption from equal access requirements for one-way paging. United States v. Western Electric Co. (D.D.C. Feb. 16, 1989). The Department of Justice has proposed that acknowledgment paging, data services and IS-41 signalling also be exempted from equal access, finding that such exemptions "are in the public interest." It noted, for example, that an exemption for CDPD would "facilitate the early

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15/ Comments of MCI at 3 (costs should not be considered as a basis to exempt CMRS carriers from equal access because costs can be recovered from participating IXCs.) CMRS providers should be permitted to provide equal access through the LECs' access tandem. Comments of BellSouth at 40. This will further minimize costs of equal access for small carriers. See also Comments of State of New York ("costs are not significant") and Comments of State of California (costs "should be minimal").

16/ Comments of AirTouch at 19; Comments of PCIA at 7; Comments of McCaw at 36.

provision of this important service."[17/] The Commission should also exclude these specific services from CMRS equal access.

III. THE RECORD PROVIDES NO BASIS FOR TARIFFING LEC-CMRS INTERCONNECTION.

The record in this proceeding demonstrates that the costs of tariffing far exceed any possible benefits. Parties showed that the current regulatory structure, which relies on negotiated contracts for interconnection between the LECs and cellular carriers, provides sufficient protection for CMRS providers. Moreover, unlike rigid tariffs, interconnection arrangements that are reached through negotiations between carriers provide the most flexibility and allow the optimal amount of input, including technical information, from carriers requesting interconnection. The current regulatory system will also allow the needed technical flexibility for new services such as PCS, given the considerable present uncertainty as to how interconnection with these services will occur.[18/]

The comments of existing CMRS providers reveal a consensus that negotiated interconnection is satisfactory. This is significant because these are the parties with the most immediate

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17/ Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Relief, filed July 25, 1994, at 42-45.

18/ Comments of Ameritech at 3; Comments of AirTouch at 2; Comments of AT&T at 12; Comments of Bell Atlantic at 13-14; Comments of CTIA at 17; Comments of E.F. Johnson at 6; Comments of McCaw at 23; Comments of OneComm Corporation at 20; Comments of Pacific Bell and Pacific Bell Mobile Services at 13; Comments of Paging Network, Inc. at 8; Comments of PCIA at 10; Comments of SNET Mobility at 12; Comments of Vanguard at 21.

interest in LEC interconnection. Numerous CMRS providers state that tariffing would be administratively costly, would not recognize the need for flexibility, and would likely lead to litigation and delay.[19/] Tariffing is also unnecessary because the Commission has Section 208 complaint procedures and other sanctions to police against discriminatory interconnection.[20/]

The few commenters which request tariffed interconnection provide no evidence that it would generate benefits, particularly benefits that outweigh the substantial costs which tariffing would involve both for carriers and the Commission.[21/]

Other commenters oppose tariffs, but ask the Commission to require filing of interconnection agreements and to require "most favored nation" clauses in agreements which would extend the terms of the agreement to other CMRS carriers.[22/] However, they do not justify either requirement. To the contrary, the record shows that mandatory filing of all agreements would impose needless burdens and could cause public disclosure of confidential information.[23/] MFN clauses are also unnecessary because LECs are

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19/ Comments of Alltel at 7; Comments of BellSouth at 9; Comments of AirTouch at 21; Comments of AT&T at 13; Comments of BellSouth at 8.

20/ Comments of Pacific Bell at 13; Comments of McCaw at 23; Comments of CTIA at 24.

21/ Comments of GSA at 5; Comments of Puerto Rico Telephone Company at 3; Comments of the California Public Utility Commission at 3; Comments of Point Communications Company at 5.

22/ Comments of Cox at 12-13; Comments of Columbia PCS at 7; Comments of Dial Page at 6.

23/ Comments of McCaw at 24.

already obligated to provide service on a non-discriminatory basis. They would promote disputes about whether providers are similarly situated and would also eliminate the flexibility needed for achieving individualized arrangements with CMRS providers.[24/]

IV. THE RECORD DOES NOT WARRANT SPECIFIC RULES FOR CMRS-TO-CMRS INTERCONNECTION BUT SUPPORTS EXTENSION OF RESALE OBLIGATIONS TO ALL CMRS PROVIDERS.

The record provides no basis for the Commission to consider specific rules for CMRS-to-CMRS interconnection at this time. While it should reaffirm that CMRS providers may not deny reasonable requests for interconnection and must offer interconnection on a non-discriminatory basis, there is no need to establish detailed interconnection requirements.

First, the comments show that CMRS providers do not have monopoly control over essential bottleneck facilities nor market power to create barriers to entry.[25/] Second, LEC interconnection is already available to all CMRS providers. Third, experience shows that CMRS providers (for example, paging and cellular carriers) have reached voluntary interconnection arrangements to serve the needs of their customers. This indicates that there is no need to intervene to regulate new or existing CMRS providers. Fourth, the record also shows that new interconnection rules would

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24/ Comments of Ameritech at 3; Comments of PCIA at 12; Comments of Waterway Communications Systems at 9; Comments of BellSouth at 11.

25/ Comments of Bell Atlantic at 15-17; Comments of McCaw at 5; Comments of RAM Mobile Data USA at 6; Comments of Rochester Telephone Corporation at 10.

impose costs on CMRS providers, reducing the ability of all providers but especially new entrants to compete. Deferring consideration of new rules is particularly important given the new services and technologies which aleady are or soon will be offering CMRS. Crafting specific rules is infeasible and would undermine the need for CMRS carriers to have maximum flexibility in negotiating mutually beneficial interconnection agreements.[26/]

Alone among commenters, the National Cellular Resellers Association requests that the Commission immediately adopt CMRS-to-CMRS interconnection requirements -- through a Public Notice. Comments at 6. Such cart-before-the-horse action would be illogical, unwarranted, and would violate the rulemaking requirements of the Administrative Procedure Act and the Communications Act. The Commission has chosen the proper course by considering the need for interconnection requirements through this rulemaking. If, despite the record, the Commission determines that further consideration of new rules is warranted, it must then propose such rules. NCRA supplies no need and no legal basis for the bypass of rulemaking procedures that it demands.

The Commission should, however, prohibit restrictions on the resale of any CMRS service. The Notice (at ¶ 137) sought comment on extending the current obligation on cellular carriers to offer unrestricted resale (Section 22.914) to other CMRS providers. Bell Atlantic and the vast majority of other commenters support this change, both because unrestricted resale is itself desirable

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26/ Comments of McCaw at 9; Comments of PCIA at 16; Comments of CTIA at 25.

and because failing to require it, as long as it remains a rule for cellular carriers, would conflict with the Section 332's mandate of regulatory symmetry.[27/] The Commission can and should adopt a straightforward rule for all CMRS carriers paralleling Section 22.914.

Commenters in the SMR and paging industries contend that the Commission should create a special exemption from resale requirements for their services.[28/] But they supply no reason why SMR or paging in this context is different from cellular service and thus why differential treatment might be justified. Because these entities do not provide any evidence that resale obligations would burden SMR and paging services differently from cellular service, regulatory parity requires applying the Commission's policy in favor of resale to all CMRS providers. Unrestricted resale is, in fact, even more important in the wide-area SMR service, because at this time only one company, Nextel, is offering this service and is rapidly acquiring potential SMR competitors.

BellSouth requests that the Commission clarify that Section 22.901, the Commission's separate subsidiary requirement for BOC-affiliated cellular carriers, does not apply to the resale of cellular service, and that BOCs may engage in resale without

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27/ Comments of Bell Atlantic at 17; Comments of Alltel at 9; Comments of American Personal Communications at 8; Comments of Allnet Communication Services at 7; Comments of BellSouth at 22; Comments of CTIA at 34; Comments of LDDS at 21-22; Comments of MCI at 12; Comments of PCIA at 19; Comments of Rochester Telephone at 10-12.

28/ Comments of Paging Network at 12; Comments of NABER at 11. Comments of AMTA at 15.

establishing a separate subsidiary.[29/] Bell Atlantic supports this request.[30/] The language of Section 22.901 indicates that its intent was to bar BOCs from offering facilities-based cellular service, not from resale. Permitting resale is in the public interest because it would introduce new avenues of distribution. In addition, the Commission has determined that BOCs may obtain licenses for PCS service without the need to offer PCS through a separate subsidiary.[31/] There is no reason why BOCs should be barred from offering resale of only one type of CMRS service.[32/] Given the ambiguity in Section 22.901, however, clarification is warranted.

29/ Comments of BellSouth at 26.

30/ Bell Atlantic does not agree with BellSouth, however, that the rules prohibit the marketing of cellular service as an agent. Section 22.901(d)(1) does not permit the carrier to market on behalf of the separate corporation, "except on a compensatory, arms-length basis." If the commissions paid fully compensate the LEC for the sale, and the agency contract is negotiated on an arms-length basis, this condition would be met, and the agency arrangement permitted.

31/ Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, released October 22, 1993, at ¶ 126.

32/ There is also no reason why BOCs should be prohibited from offering facilities-based cellular service as well. Given the Commission's decision on PCS resale, the level of competition in the cellular industry, and the presence of accounting and other non-structural safeguards, Section 22.901 is an unnecessary anachronism. Ameritech has petitioned to repeal Section 22.901 in its entirety. The Commission should take up Ameritech's petition.

V. CONCLUSION

The record in this proceeding does not support tariffing of LEC-CMRS interconnection or considering new regulation of CMRS-CMRS interconnection. It does, however, warrant adoption of uniform equal access rules for cellular, PCS and SMR carriers which are coextensive with the equal access requirements currently imposed by the MFJ court. The Commission should act promptly to stop the continuing damage to competition which the current system of partial equal access is causing.

Respectfully submitted,

THE BELL ATLANTIC COMPANIES

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